(3)

No. 90-1800

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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GRUMMAN AEROSPACE CORPORATION,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

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## BRIEF AMICUS CURIAE OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION IN SUPPORT OF THE PETITIONER

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## BRIEF AMICUS CURIAE OF THE NATIONAL SECURITY INDUSTRIAL ASSOCIATION IN SUPPORT OF THE PETITIONER

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### STATEMENT OF INTEREST

With the consent of the parties,[1] the National Security Industrial Association ("NSIA") respectfully submits this brief *amicus curiae* in support of Grumman Aerospace Corporation's ("Grumman") petition. NSIA is a national organization of some 400 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the United States' national security needs. NSIA's membership includes most of the American manufacturing companies on the Department of Defense's annual list of contractors who receive the largest volume of awards. In

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[1] The consent letters of both counsel have been filed with the Clerk of the Court.

addition, NSIA's membership includes many small and medium-sized companies that provide goods and services to the federal Government. One of NSIA's most important functions is the presentation of views of its members on Government procurement issues. The case before the Court involves an important Government procurement issue that is of direct and immediate interest to NSIA.

The case at bar has the potential to affect virtually every member of NSIA. Indeed, the decision below [2] is already having an impact on NSIA's membership in a very tangible way as the boards of contract appeals react to the decision. The Armed Services Board of Contract Appeals ("ASBCA"), for example, "is reviewing its pending cases to identify those in which the certification may present a possible problem" as a result of the Federal Circuit's decision below. 55 Fed. Cont. Rep. (BNA) 369-70 (March 25, 1991).

> [ASBCA Chairman] Williams stressed that the board must continue to resolve appeals, despite the uncertainties attendant on the Federal Circuit's opinion and the contractor's request for review by the U.S. Supreme Court. Because a proper certification is a jurisdictional prerequisite to board action, if a certificate is defective, any decision rendered by the board on that claim will be a nullity. Williams indicated that contractors are being contacted in an effort to keep the board from 'spinning its wheels' and issuing 'decisions that have no weight.'

*Id.* at 370. As of October 1, 1990 the ASBCA's active docket reflected 2,462 pending appeals.[3]

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[2] The decision below appears in Petitioner's Appendix A and is reported at 927 F.2d 575.

[3] Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals For the Fiscal Year Ending 30 September 1990, *reprinted in* 55 Fed. Cont. Rep. (BNA) 106 (Jan. 28, 1991). In addition to the ASBCA, there are *eleven* other agency

The decision below thrusts the status of an untold number of pending and potential claims into question. Contractors, Government agencies, the boards of contract appeals and the Claims Court must now examine not only the status of every claim exceeding $50,000 that is the subject of a pending appeal or suit before a board or the Claims Court, but also: (1) every claim that might in the future be submitted to a Government contracting officer for appeal; (2) every claim that has already been submitted to a Government contracting officer but has not yet been appealed; and (3) every claim that has already been fully adjudicated in a board appeal or Claims Court suit where the appeal rights have not yet run. The Government contracting community is totally confounded as to how to proceed with the certification and administration of future claims and disputes, which, in the aggregate, could involve billions of dollars.

If the decision below is permitted to stand, the taxpayer will also be called upon to pick up substantial costs of wasted judicial and litigation effort. Claims that have already been litigated, or partially litigated, will be relitigated. In addition, hundreds if not thousands of motions will be argued regarding the certification issue.

The problem is compounded by the fact that the Federal Circuit itself evidences a very profound split on virtually every issue in the decision. At least four judges from the Federal Circuit believe that: (1) claims certification is not a jurisdictional prerequisite to the power of any agency board of contract appeals or the United States Claims Court to review a Government contracting officer's decision on a claim submitted under the Contract Disputes Act of 1978; (2) the regulation that purports to interpret § 605(c)(1) of the Contract Disputes Act of 1978 is not entitled to judicial deference; and

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boards of contract appeals. The United States Claims Court is also vested with jurisdiction to hear appeals under the Contract Disputes Act. 28 U.S.C. § 1491(a)(2).

(3) in any case, the decision below misconstrued the regulation.

NSIA is concerned because of the pervasive impact that the decision below is having on the Government contracting community. NSIA respectfully submits this brief *amicus curiae* and urges the Court to grant Grumman's petition for *certiorari*.

## ARGUMENT

### I. THE CONTRACT DISPUTES ACT'S CLAIM CERTIFICATION REQUIREMENT DOES NOT RELATE IN ANY WAY TO THE JURISDICTION OF THE FEDERAL AGENCY BOARDS OF CONTRACT APPEALS OR THE UNITED STATES CLAIMS COURT

#### A. Section 605(c)(1) Of The Contract Disputes Act Does Not Establish Jurisdictional Prerequisites For The Review Of A Contracting Officer's Decision

The decision below advances the erroneous view that a contractor's proper certification of a claim submitted under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 ("CDA"), is a jurisdictional prerequisite for a subsequent appeal or suit challenging a contracting officers' decision on the claim. The CDA's claim certification requirement appears in § 605(c)(1), which provides in pertinent part:

> A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. *For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.*

41 U.S.C. § 605(c)(1) (emphasis added).

There is absolutely no indication, either in the plain language of § 605(c)(1), or in its legislative history, that a contractor's obligation to certify the accuracy of a claim exceeding $50,000 is a jurisdictional prerequisite to review of a contracting officer's decision at the Claims Court or at an agency board of contract appeals. Rather, an uncertified or improperly certified claim is the conceptual equivalent of a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).[4] As the dissent below states:

> [F]ailure to properly certify a claim under the CDA does not speak to subject matter jurisdiction—it merely means that the particular claimant has failed to state a claim for which, under the terms of the statute, relief may be granted.

Pet. App. A at 17a. Because the certification requirement is not jurisdictional, it is subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Thus, the decision below erred in ordering the dismissal of Grumman's appeal after the appeal had been fully litigated at the ASBCA.[5]

### B. Congress Addressed The Subject Matter Jurisdiction Of The Boards And The United States Claims Court In §§ 607 And 609 Of The CDA And § 1491 Of The Tucker Act

Section 607(d) of the CDA addresses the authority of agency boards of contract appeals to consider contractor appeals from contracting officers' decisions:

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[4] Once there is a decision on the merits, it is too late to raise a "failure to state a claim" defense. *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 359 (1st Cir. 1989) (defendant waived its right to raise issue by bringing it after trial on the merits); *Weatherhead v. Globe Int'l., Inc.*, 832 F.2d 1226, 1228 (10th Cir. 1987) (motion to dismiss for failure to state a claim waived if not raised until after trial); Fed. R. Civ. P. 12(h)(2).

[5] The ASBCA ruled in Grumman's favor on the merits of its claim. Pet. App. B, *Grumman Aerospace Corp.*, ASBCA No. 34665, 90-1 B.C.A. (CCH) ¶ 22,417 (Oct. 24, 1989).

> Each agency board shall have *jurisdiction* to decide *any appeal from a decision of a contracting officer* (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal.

41 U.S.C. § 607(d) (emphasis added).

The Tucker Act, 28 U.S.C. § 1491, establishes the jurisdiction of the Claims Court to review contractor appeals of contracting officer decisions pursuant to the CDA: "[t]he Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978." 28 U.S.C. § 1491(a)(2). Section 10(a)(1) of the CDA is codified at 41 U.S.C. § 609 and provides as follows:

> (1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to a agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

41 U.S.C. § 609.

There is absolutely no language in any of these statutory provisions to indicate that the CDA's claim certification requirement was intended to limit the statutorily established authority of agency boards of contract appeals or the Claims Court to review final contracting officer decisions under the CDA. Indeed, 28 U.S.C. § 1491 (a)(2) makes clear that the Claims Court has jurisdiction to render a judgment on *any claim* filed by a contractor under the CDA.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. at 385, this Court considered whether a statutory time limit in the Civil Rights Act of 1964, 42 U.S.C. § 2000e,

*et seq.*, for filing a discrimination claim with the Equal Employment Opportunity Commission ("EEOC") was a jurisdictional prerequisite to a claimant's right to file suit in federal court. The Court concluded that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393 (footnotes omitted).

The Court in *Zipes* found it significant that the section of the statute which set forth the time limitations for filing charges with EEOC was *separate* from the section that established the district courts' jurisdiction to consider claims under the statute. The Court also found it significant that the statute's timeliness requirements did not speak in jurisdictional terms. "The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it *does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.*" *Id.* at 394 (emphasis added). Like the statutory provision construed in *Zipes*, § 605(c)(1) of the CDA nowhere "speaks in jurisdictional terms" or even refers to the jurisdiction of the boards of contract appeals or the Claims Court.

We respectfully submit that the CDA's claim certification requirement is not a jurisdictional prerequisite to the review of a contracting officer's decision by the Claims Court or an agency board of contract appeals.

### C. The Decision Below Relies On Earlier Decisions From The Court Of Claims And The Federal Circuit But Does Not Analyze The Reasoning In Those Decisions

The decision below offers that it is "well settled" that the CDA's certification requirement is a jurisdictional prerequisite to the right of a board of contract appeals or the Claims Court to consider an appeal from a contract-

ing officer's decision on a contractor's claim. Pet. App. A at 7a. The decision provides absolutely no discussion as to why it so concludes. A close reading of the prior decisions upon which the panel relies reveals their similar lack of analysis. For the most part, the cases that have considered the jurisdictional issue simply cite to earlier decisions with little or no analysis of their own.

The notion that the proper certification of a claim has jurisdictional consequences began with *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352 (Ct. Cl. 1982).[6] In *Lehman*, the Court of Claims held that "[u]nless a claim has been properly certified, it cannot be considered under the statute" and "unless that requirement is met, *there is simply no claim that this court may review under the Act.*" *Id.* at 355 (emphasis added). The *Lehman* decision never discussed the issue of jurisdiction. Indeed, the court's reasoning implies that a contractor's failure to submit a properly certified claim presents a board of contract appeals or the Claims Court with a claim upon which relief cannot be granted.

The practical distinction between an absence of subject matter jurisdiction and a party's failure to state a claim is that the former simply cannot be waived, at any stage of the proceeding, *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986), while the latter can. A litigant waives the right to raise a defense of "failure to state a claim" after a court has considered a matter on

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[6] The Court of Claims also briefly discussed the "jurisdiction" purportedly conferred by the CDA's certification requirements in an earlier case, *Paragon Energy Corp. v. United States*, 645 F.2d 966 (Ct. Cl. 1981). In *Paragon*, however, the issue was whether the contractor had submitted any claim at all. In *dicta*, the court said, "Absent this 'claim,' no 'decision' is possible—and, hence, no basis for jurisdiction in this court." *Id.* at 971. The court ultimately concluded that a proper claim had been submitted. It is of interest that in that case the court determined that a mere letter from Paragon's attorney to the contracting officer, setting out Paragon's claim, met the CDA's claim requirements.

its merits. *Brown v. Trustees of Boston Univ.*, 891 F.2d at 337.

Within two months after the Court of Claims' decision in *Lehman*, it issued another decision that again addressed the issue of the sufficiency of a contractor's certification of a claim submitted under the CDA. *W.H. Moseley Co., Inc. v. United States*, 677 F.2d 850 (Ct. Cl. 1982), *cert. denied*, 459 U.S. 836 (1982). *W.H. Moseley* cited *Lehman* for the proposition that proper certification of a claim over $50,000 is a jurisdictional prerequisite to the Claims Court's review of a contracting officer's decision regarding the claim. *W.H. Moseley* also held that the Government's earlier failure to raise a jurisdictional defense could not be the subject of estoppel or waiver despite the contracting officer's issuance of a final decision on the contractor's uncertified claim. *Id.* at 852.

Thereafter, the decisions from the Court of Claims and, later, from the Federal Circuit typically cite *Lehman* and *W.H. Moseley* as being dispositive of the jurisdictional issue.[7] In *Thoen v. United States*, 765 F.2d 1110 (Fed. Cir. 1985), the Federal Circuit went a step further. Without any citation to specific language in the statute or legislative history, the court stated that "Congress has determined that submission of a certified claim to the contracting officer in the first instance is a jurisdictional prerequsite to filing a suit in the Claims Court." *Id.* at 1116. Following *W.H. Moseley*, the cases that have considered the jurisdictional issue, have simply fallen in line on the issue, without further analysis.

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[7] *See, e.g., Skelly & Loy v. United States*, 685 F.2d 414, 417 (Ct. Cl. 1982) ("It is clear from a reading of the statute and prior decisions of this court that we have no jurisdiction, under the CDA, to entertain an uncertified claim for over $50,000."); *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983); ("[T]he certification requirement is jurisdictional . . ."); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1337 (Fed. Cir. 1983) ("[W]e have no jurisdiction because the claim the appellant submitted to the contracting officer was not certified.").

### D. In 1989 The Federal Circuit Compounded The Impact Of Its Jurisdictional Rulings In A Decision That Relied On An Interpretative Regulation To Determine Whether A Board Possessed Subject Matter Jurisdiction

Prior to 1989, none of the Federal Circuit's reported decisions that dealt with claims certification had ever focused on the identity of the individual certifying on behalf of a contractor. Rather, these decisions focused on the language of the certification provided or whether certification had been provided at all. However, in *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426 (Fed. Cir. 1989), the court extended its jurisdictional analysis by looking away from the governing language in the CDA and towards a provision in the Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 33.207(c)(2).

That regulation, first promulgated by the Office of Federal Procurement Policy ("OFPP") in 1980, purports to interpret § 605(c)(1) of the CDA. The regulation provides:

> (2) If the contractor is not an individual, the certification shall be executed by—
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

The regulation's certification requirements are clearly more restrictive than those included at § 605(c)(1) of the CDA. The CDA's certification requirement merely states that contractors must certify all claims over $50,000, while the regulation substantially limits the number of contractor representatives who are eligible to certify on behalf of the contractor.[8]

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[8] The regulatory history of FAR § 33.207(c)(2) and its legal effect with regard to the requirements of § 605(c)(1) of the CDA are discussed in II, *infra*.

Thus, in *Ball, Ball & Brosamer*, the court affirmed the Interior Board of Contract Appeals' dismissal of a contractor's appeal from a contracting officer's final decision for lack of subject matter jurisdiction. The basis for the board's decision was that the individual who had certified the contractor's claim, the contractor's project manager, was not qualified to certify on behalf of the contractor under the criteria set out in FAR § 33.207(c)(2).

The decision below held that the certification by Grumman's senior vice president and treasurer did not meet the requirements of FAR § 33.207(c)(2), and therefore did not meet the CDA's certification requirements. Therefore, the court directed the ASBCA to dismiss Grumman's appeal. In essence, both *Ball, Ball & Brosamer* and the decision below have allowed OFPP to establish the jurisdictional boundaries, not only of the boards, but of the Claims Court as well. This is clearly inappropriate.

## II. THE REGULATION THAT PURPORTS BOTH TO INTERPRET AND TO IMPLEMENT THE CDA'S CERTIFICATION REQUIREMENT IS INCONSISTENT WITH THE STATUTE'S CLEAR INTENT

### A. The Certification Requirement Embodied In § 605(c)(1) Of The CDA Provides Clear Direction And Does Not Require Regulatory Interpretation

Section 605(c)(1) of the CDA requires contractors to certify all claims exceeding $50,000 that are to be submitted to the Government under the CDA. The statute is straightforward and unambiguous. The CDA defines contractor as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4). The term "contractor" may refer either to an individual or to a company. A company necessarily acts through individuals who are vested with authority, under the principles of agency, to bind the company.

In *Little River Lumber Co. v. United States*, 21 Cl. Ct. 527 (1990), the court examined whether Congress in-

tended for the law of agency to govern corporate certification of claims under the CDA and concluded that it did. The court stated:

> Corporations must act through individuals, and the ordinary rule is that an individual who is properly appointed as an agent of a corporation has the authority to bind that corporation within the scope of his or her authority.
>
> * * * *
>
> There is nothing in the wording of Section 605(c)(1) that suggests this ordinary rule should not apply to certification of claims.

*Id.* at 533. In contrast, the decision below concluded that § 605(c)(1)'s silence as to precisely who within a corporate contractor's organization has authority to certify a claim on behalf of a contractor constitutes a "gap" that FAR § 33.207(c)(2) permissibly fills. Pet. App. A at 5a. Careful review of the CDA's language and its legislative history confirms that there simply is no "gap" in § 605(c)(1) that requires filling.[9]

The reliance by the decision below on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is clearly misplaced. *Chevron* instructs that the starting point of statutory construction is whether the language of the statute is clear on its face. If it is, a court need look no further than the statute itself to determine the statute's meaning. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambigu-

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[9] The Senate added the certification requirement codified at § 605(c)(1) on October 12, 1978. During earlier hearings on the CDA in 1978, Admiral Rickover suggested that the CDA should include a provision that required a contractor's certificate to be executed by a senior official within the contractor's organization. As the court in *Little River Lumber Co. v. United States*, correctly stated, however, "[u]ltimately, Congress did not adopt [Admiral Rickover's] suggestion when it drafted the specific language of Section 605." *Id.* at 534.

ously expressed intent of Congress." *Id.* at 842-43 (footnote omitted). "The plain meaning of the Statute decides the issue presented." *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 403 (1988) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and *Chevron*).

We respectfully submit that § 605(c)(1) of the CDA is clear on its face. It reflects congressional intent that the contractor should choose for itself who within its organization should have authority to bind the company through claim certification.

**B. In Contrast To The CDA, The 1979 DoD Authorization Act Explicitly Identifies A Limited Category Of Individuals Who Are Authorized To Certify Contractor Claims In Excess Of $100,000**

During the same time frame that Congress enacted the CDA in 1978, it also passed the Department of Defense Appropriation Authorization Act of 1979, Pub. L. No. 95-485, 92 Stat. 1611 (1978) ("1979 DoD Authorization Act"). Section 813 of the 1979 DoD Authorization Act prohibits *payment* of a contract claim exceeding $100,000 from funds authorized to be appropriated to the Department of Defense "*unless a senior company official in charge at the plant or location involved has certified* at the time of submission . . . that the claim or request is made in good faith and that the supporting data are accurate and complete to the best of such official's knowledge and belief." 92 Stat. at 1624-25 (emphasis added).

The differences between the certification requirements in § 605(c)(1) of the CDA and those in § 813 of the 1979 DoD Authorization Act are obvious. Congress considered, and clearly rejected, Admiral Rickover's recommendation that the CDA specify precisely which individuals within a contractor's organization would be authorized to execute a CDA certification on behalf of a contractor. In contrast, Congress chose to include a separate certification provision in the 1979 DoD Authorization

Act. This certification requirement, modeled on Admiral Rickover's suggestion, has nothing to do with the CDA or the jurisdiction of the twelve boards of contract appeals or the United States Claims Court. It relates strictly to the right of the Defense Department to use appropriated funds to pay claims in excess of $100,000.

The contemporaneous enactment of the two statutory provisions offers strong indication that had Congress intended to specify in § 605(c)(1) of the CDA precisely *who* within a contractor's organization would be authorized to certify a claim on behalf of a contractor, it would have included language in the CDA similar to that included in the 1979 DoD Authorization Act. In fact, it considered and rejected this proposal. The Federal Circuit's conclusion that there is a "gap" in the CDA's certification coverage is simply wrong.

### C. Even If The Issuance Of An Interpretative Guideline To § 605(c)(1) Of The CDA Was Appropriate, The OFPP's Interpretation In This Instance Is Not Entitled To Deference

Section 607(h) of the CDA, entitled "Procedural Guidelines", confers upon the OFPP authority to issue *guidelines* in connection with the administration of the CDA before the boards of contract appeals. The section expressly limits OFPP's regulatory authority, however, to issue "criteria for the establishment, functions, and procedures of agency boards." *Id.* Courts are required to give less deference to agency interpretative guidelines than they give to agency regulations that are promulgated pursuant to a congressional declaration that such regulations shall have the force and effect of law. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

OFPP's interpretation of § 605(c)(1), now reflected in FAR § 33.207(c)(2), should be accorded little deference. First, for well over a year after the CDA went into effect, OFPP did not issue any interpretation or guid-

ance regarding the certification requirement included in § 605(c)(1) of the CDA. During this period, the sufficiency of a contractor's CDA certification was, appropriately, measured by standard agency principles. Second, OFPP's interpretation of the CDA's certification requirement, as currently reflected in FAR § 33.270(c)(2), represents a departure from OFPP's initial position. "An agency's interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. at 446, n.30 (quoting from *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

OFPP first published a proposed "direction" regarding "Uniform Rules of Procedure for Boards of Contract Appeals" on January 25, 1979, along with a proposed amendment to § 1-314 of the Defense Acquisition Regulation and § 1-1.318 of the Federal Procurement Regulations regarding claim certification requirements. OFPP's proposed amendments read in pertinent part:

> In the case of claims or amendments to claims exceeding $50,000 . . . *the Contractor shall certify*, when the Contracting Officer and the Contractor agree that the claim is ready for a decision under (f) below,

44 Fed. Reg. 5,224 (1979) (emphasis added). The certification form simply provided for the contractor's name and the title of the individual executing the certificate on behalf of the contractor. *Id.* This proposed amendment to the existing regulations and claim certification form suggests that OFPP initially believed there was no need for it to designate, through regulation, precisely which individuals would be empowered to execute CDA claims on behalf of federal contractors.

On March 7, 1979 OFPP published its interim final rule in the Federal Register. Once again, OFPP's interim rule made no mention of the issue of certification

authority. 44 Fed. Reg. 12,524 (1979). Nor did the next version of OFPP's certification form, which appeared in the Federal Register on June 14, 1979, address this issue in any way. 44 Fed. Reg. 34,229 (1979).

Nearly a year later, on May 9, 1980, OFPP published a policy directive that rescinded the office's previous guidance and the standard Contracts Dispute clauses published on March 7, 1979 and June 14, 1979, respectively. In addition, OFPP's May 9, 1980 policy directive purported to provide final regulatory coverage regarding the administration of § 605(c)(1) of the CDA. 45 Fed. Reg. 31,035 (1980).

It was not until issuance of its May 9, 1980 policy directive that OFPP decided to add a provision that placed limitations upon which individuals would be authorized to certify claims on behalf of contractors under the CDA. *Id.* at 31,036-37. But even with this change, OFPP itself indicated in its introductory comments that its guidance was technical and procedural in nature, not substantive:

> The final disputes clause and the regulations also provide *technical changes* from the interim clause and regulations with regard to payment of interest, *procedures for certification* of a claim exceeding $50,000 and other areas. These changes are made to better reflect the intent of the Contract Disputes Act.

*Id.* at 31,035 (emphasis added). The substance of the OFPP's 1980 "technical" changes remains in the current version of FAR § 33.207(c)(2).

### D. The CDA's Certification Requirements Have Not Changed Since The Statute's Enactment In 1978

Despite the fact that the CDA's requirements regarding certification have not changed since the statute's enactment in 1978, the Court of Claims and Federal Circuit decisions that interpret the certification requirements cumulatively stand for the following fundamentally in-

consistent propositions: (1) with respect to a claim in excess of $50,000 that was submitted to a contracting officer between March 1979 and June 1, 1980, the boards and Claims Court were vested with subject matter jurisdiction to review the merits of such claim, provided the claim had been certified by an individual authorized to bind the company under the law of the agency; (2) with respect to claims submitted after June 1, 1980, the boards and Claims Court lack subject matter jurisdiction to review such claims unless the claims bear certifications executed by an individual who meets the rigid criteria set out in OFPP's "guidance". Surely, a federal court or board's subject matter jurisdiction cannot be such a fleeting power that it was present on May 31, 1979 but gone on June 1, 1980 without any intervening statutory changes.

Incredibly, the decision below elevates the changes that OFPP made to its guidance in 1980, which OFPP characterized as technical and procedural in nature, to jurisdictional in stature. The decision's holding that the jurisdiction of the boards of contract appeals and the United States Claims Court is to be measured by reference to the guidance in FAR § 33.207(c)(2), has, as the dissent below correctly points out, "create[d] not only analytical difficulties, but practical ones as well." App. A at 17a.

## III. THE PANEL'S INTERPRETATION OF FAR § 33.207(c)(2)'S REQUIREMENTS IS ERRONEOUS

### A. FAR § 33.207(c)(2)(i) Does Not Require That A Certifying Senior Company Official Be Physically Located At The Contractor's Plant

The decision below interpreted the requirements of FAR § 33.207(c)(2)(i) such that a senior company official who is in charge of the contractor's plant involved with the claim would not be entitled to certify the claim on behalf of the contractor unless he also maintained *a physical presence* at the contractor's plant. "The first de-

scription demands that the certifying senior company official have both primary responsibility for the execution of the contract *and* a physical presence at the location of the primary contract activity." Pet. App. A at 9a (emphasis in original). The panel's interpretation adds a requirement that the regulation simply does not impose.

For many contractors, especially those with multiple locations, the court's interpretation of the regulation means that no one within their organization can meet the standard set out in FAR § 33.207(c)(2)(i). For these contractors, a plant manager physically located at a particular plant or location usually is not a "senior company official". Conversely, many contractors' senior company officials will no doubt be "in charge" of several plants or locations, and therefore, will not, in most instances, be physically located at the particular location performing the contractual effort. The panel's requirement of "physical presence" causes even more problems if the contract upon which a contractor's claim is based is performed in two or more locations, which is quite common within the Government contracting industry. Thus, the decision below, if allowed to stand, will require many contractors to look solely to FAR § 33.207(c)(2)(ii) to determine who within their organizations may certify claims under the CDA.

### B. Contrary To The Holding In The Decision Below, FAR § 33.207(c)(2)(ii) Contemplates That A Number Of Officers Within A Contractor's Organization May Possess Overall Responsibility For A Contractor's Affairs

The panel's conclusion with regard to FAR § 33.207(c)(2)(ii)'s requirement is equally disturbing. The panel determined that Grumman's senior vice president and treasurer did not possess "overall responsibility for the conduct" of Grumman's affairs.[10] The panel denies

[10] The panel apparently accepted the ASBCA's conclusion that Grumman's senior vice president and treasurer had overall responsi-

that its interpretation of the regulation establishes the principle that a contractor's chief executive officer may be the only individual within a contractor's organization who is qualified under the CDA to certify a contractor's claim. "GAC grossly exaggerates in arguing that this court held in its earlier opinion, at least by implication, that a corporation's CEO is the only individual that may certify a corporate contractor's claim." Pet. App. A at 10a. However, the panel refuses to provide any guidance as to what is meant by the phrase "overall responsibility for the conduct of a contractor's affairs."

As a practical matter, the court's silence leaves contractors with few options. Following the Federal Circuit's decision below, most Government contractors must conclude that the only individual within their organization who is empowered to certify a claim under the CDA is the chief executive officer of the company. Most chief executive officers do not have any specific knowledge regarding a particular claim. Thus, the decision below has not only caused upheaval in the Government contracting community, it has run afoul of the whole purpose behind the CDA's certification requirement.

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bility for financial affairs, but concluded that overall responsibility for financial affairs was not sufficient under the regulation. Pet. App. A at 10a.

## CONCLUSION

For the reasons stated, NSIA respectfully urges this Court to grant the petition for certiorari filed by Grumman Aerospace Corporation.

Respectfully submitted,

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